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No. 509

IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA

(OCTOBER TERM A. D. 1947)

HARRY R. RANDALL, *Petitioner*

vs.

UNTED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY OF PETITIONER TO RESPONDENT'S BRIEF

STATEMENT

(Jurisdictional matters and questions presented having heretofore been stated for brevity reference is made to such former statements.)

The Indictment in this cause charges the existence of a conspiracy to violate the banking laws. (R. 2.)

The evidence showed Randall was obtaining money by drawing checks on the National City Bank of Evansville. Further that Perry was paying those checks. That Perry and Petitioner talked at the bank and at Petitioner's office about repayment repeatedly and openly. That they had a thorough understanding

and there was nothing underhanded about the transaction (R. 136) continuing Sterling J. Perry testified:

> "Q. Well, would you amplify a little more what you and he would say to each other about this when you would meet?
>
> "A. Well, I didn't confide in him where the money was coming from at all. We discussed repayment—things like that. He was always trying to hit it, and he always promised to repay." (R. 136.)

Perry further testified that so far as he knew Petitioner did not know he (Perry) was taking the Bank's money. (R. 149.)

Again Perry testified that all the money furnished Petitioner was in payment of checks drawn by Petitioner on the bank and returned to Petitioner. (R. 151.)

Again Perry testified under questioning by prosecutor: That the reason he continued to pay the Randall checks was that he always had a feeling in trying to help people and that he was very sympathetic toward Mr. Randall. He was trying to do things, and I guess *I overestimated my depth*, and when I finally woke up to the situation I had too big a job on my hands. (R. 169.) That Perry had no financial interest in Petitioner's drilling business. (R. 170.)

On page 135 of the record nothing appears concerning any urgency, however, at R. 137 is found the following:

> "Q. How often did you and Mr. Randall meet?

"A. Not so often. He wasn't in town a great deal.

"Q. Where did you meet?

"A. Well, we would go to lunch every once and a while, when he came to town off his trips, where he was promoting his trips like New York and Dallas—and he would come back and discuss the matter, and he would tell me his plans, and what he had done.

"Q. On this occasion he would discuss the urgency of getting this matter straightened up?

"A. Not every time.

"Q. But you did on occasions?

"A. Yes, sir."

ARGUMENT

1. Not only does Petitioner Randall contend that there was no proof that he knew that the money received from Perry came from misapplications of the bank's funds, but also Petitioner Randall contends that there is no evidence direct or circumstantial that any conspiracy existed between Randall and Perry. A conspiracy is an unlawful agreement expressed or implied. It is fundamental that no agreement can be made without the mutual assent of the contracting parties. Since there is no evidence, direct or circumstantial of any character, which would tend to support the Government's theory that an unlawful agreement was made, or an implied understanding existed, on Petitioner's part, that Perry would misapply funds of the bank, then the trial court should have sustained the motion for an instructed verdict. We have

advanced the argument and have cited numerous cases to support the contention of petitioner that in order for the proof to measure up to the requirements of the law in establishing a conspiracy by circumstantial evidence that the circumstances relied on by the Government *must be* required to point so surely and unerringly to the guilt of the defendant as to exclude every other reasonable hypothesis but that of guilt. Since Randall could not be guilty of conspiracy, regardless of what Perry did or did not, unless he had either expressly impliedly agreed to Perry's defalcation, it naturally follows that the proof does measure up to the requirement above stated.

We challenge the statement that Petitioner Randall knew his checks were not being cleared in the regular fashion and right of the Government to rely on such a circumstance to establish the existence of a conspiracy as frivolous.

The specious argument that the jury had a right to infer that businessmen do not obtain personal loans from the cashier of a bank by drawing checks on the bank itself falls of its own weight. Perry was an executive officer of the bank; he had a right, nay it was his duty, as a representative of the stockholders of the bank to loan money of the bank, and he likewise had a right to loan any of his own personal funds to any person to whom he thought was deserving. Some of the checks in evidence were given at distant points from the bank, nothing was simpler than to draw a check on the bank which is ordinarily accepted in a transaction whereas a personal draft on the cashier is

more often rejected than otherwise. The fact that Perry delivered the returned checks to Randall in a unorthodox manner lend great credence to theory that Randall believed himself to be a debtor of Perry and not of the bank. If this is true then Randall could not have been guilty of conspiracy, for in order for Randall to have been guilty of conspiracy he must have designed in his own heart that Perry should embezzle the very money he was receiving from Perry.

Moreover we challenge the argument of the Government that "Petitioner's practice of drawing checks on the bank for whatever expenses they had, regardless of whether or not they had funds in the bank, justified the inference that they had an understanding that Perry would see to it that their checks managed to clear the bank, and would use the bank's funds for that purpose." To follow that argument to its logical conclusion then every time a customer gives a no fund check on a national bank and it is paid the customer would be guilty of conspiracy, no matter what arrangement he might have had with an officer of the bank to pay the check out of the officer's own personal funds. The most that can be said is that Petitioner thought his check would be paid. The *Ray Case*, 114 F. 2d 508, cited by the respondent, stands on an entirely different footing, and no consolation can be drawn for respondent from it: The facts in the Ray case are substantially different, in that case the defendant Ray lived next door to the defaulting cashier; she was the god-mother of his child, she repeatedly discussed her accounts at the bank with the defendant, Ray, and they were so closely related that

it is hardly debatable that Ray knew of her operations at the bank.

Petitioner has no quarrel with the rule laid down in *United States vs. Socony-Vacuum Oil Co.*, 310 U. S. 150, at page 254 (84 L. Ed. 1129), that the question of law raised by the motion for instructed verdict was whether or not there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. Indeed, it is the burden of the petitioner's contention here that there is no evidence of a substantial nature to sustain the verdict of the jury and therefore the trial court should have instructed a verdict. There is a mass of irrelevant facts proved by the Government which tend to establish the guilt of Perry, but not one circumstance from which a jury might reasonably infer that petitioner entered into any unlawful conspiracy. and a casual reading of the record in this case will disclose that our contention is correct. In this land a man may not be convicted on suspicion. The other cases cited by the respondent add nothing to the *Socony-Vacuum case.*

Neither do we agree with respondent's unsupported conclusion that "in any event, by any standard of sufficiency of the evidence, the evidence here is sufficient."

Boiled down the evidence offered against Randall amount to:

(1) Randall was acquainted with Sterling J. Perry.

(2) Randall borrowed money from Sterling J. Perry.

(3) Randall used a method of drawing checks on the bank which Perry honored.

(4) Perry embezzled funds of the Bank, without Randall's knowledge.

(5) Randall treated the matter as a loan from Perry individually.

Candidly, we do not see the remotest connection between this evidence and the indictment returned. All of the cases, even the *Glasser case*, 315 U. S. 60, 80 (86 L. Ed. 680, 704), holds that the evidence must be substantial. Substantial evidence means real evidence, solid evidence not seeming or imaginary evidence, not mere surmises or inferences, but in this case the trial court in order to overrule the motion of the defendant had to indulge inference upon inference.

The respondent's argument seems to be that Perry knew Randall, Randall borrowed money from Perry knowing him to be an officer of the bank, Perry embezzled funds, Randall's loan came from the embezzled funds, Perry is guilty, ergo, Randall's guilty.

2. Neither can we agree that with the contention of the respondent that Perry's defalcations were not in issue on petitioner's appeal. It is an elemental principal of law, that when an indictment is returned into court charging a defendant with an offense, and the defendant is arraigned and enters a plea of not guilty, then all the allegations contained in the indictment are thereby put in issue. We do not think it could be seriously contended here that if the jury in this case had refused to believe the testimony of Perry

and the supporting witnesses, that a verdict of not guilty could have and should have been rendered.

To brush aside the contention that District Judge Lindley was not qualified to sit as a member of the circuit court of appeals by saying "there is no merit in this contention," is hardly sufficient to dispose of so serious a matter.

Let us look for a moment at what really happened: Judge Lindley tried the Sterling J. Perry indictment, the fact that Perry pleaded guilty to the indictment does not alter the circumstances, Judge Lindley had to find him guilty on his plea, which was a trial of that fact as effectively as if Perry had pleaded not guilty. On the trial of the Randall case the question of the guilt or innocence of Perry was a material issue without which there would have been no case against either Perry or Randall. Therefore, the identical question which was presented in the Perry case was likewise presented in the Randall case, and Judge Lindley had already decided the *question* of Perry's guilt on the same state of facts in the district court, therefore under section 120 of the Judicial Code he was not qualified to sit on the appeal where that same question was to be reviewed, even though it was another case.

Petitioner respectfully calls the attention to the court that the respondent has cited no case by this court or any other court in support of its contention that there is no merit to the petitioner's position that Judge Lindley was disqualified. Indeed, petitioner believes that respondent has cited no such case for the

very good reason that none exists. To limit the disqualification in such a case to a Judge who had actually tried or at some time in the procedure had made some order in the very case on appeal would be to place limit on the meaning of the statute which from its reading could not be done fairly. Such a narrow construction of Section 120 of the Judicial Code would defeat the apparent purpose of Congress, i.e., to give the appellant the benefit of a judge or judges sitting on his appeal who had not theretofore sat in judgment on the question involved. This follows the underlying or basic principle of judicial procedure that no Judge should be permitted to sit in appeal on the propriety of any act of his own, or on correctness of any question which he may have decided already.

CONCLUSION

It is respectfully urged that the case of Bristol Hackbusch, No. 555 in this Court, is a separate and distinct transaction from the Randall case; that the records are entirely different, and that there is not a scintilla of evidence that Hackbusch and Randall had any connection with each other. We believe that a careful reading of record will bear out this contention, and we do not think that since the records are entirely different that they should be considered together.

For the foregoing reasons as well as those heretofore urged by the petitioner we respectfully submit that the petition of applicant, Harry R. Randall, should be granted.

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